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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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1. Issues Presented on Appeal

Appellant is a mutual savings bank having no shares of capital stock. During the tax years in question it owned United States securities, the value of which exceeded the total value of its surplus, reserves and undivided profits. Ohio levies a tax against the ownership interests in financial institutions. The pertinent sections of the Ohio law are as follows:

Section 5408, General Code

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organ-

ized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorported financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capitol stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5412, General Code

"Upon receiving such report the tax commission of Ohio shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5638-1, General Code

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated,

> on the intangible property tax list in the office of the Auditor of State and duplicate thereof in the office of Treasurer of State at the following rates, to wit:
>
> "* * * deposits, two mills on the dollar; shares in the capital employed by financial institutions, two mills on the dollar * * *."

The Supreme Court of Ohio in its decision in the instant case applied the language of the quoted statutes to the appellant in the following language, 161 Ohio St., at pages 135-136:

> "Our conclusion is that the words, 'capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock' as found in Section 5408, General Code, the words 'the value of the property representing the capital employed by such financial institution, not divided into shares' as found in Section 5612, General Code, and the words 'capital employed by financial institutions' as found in Section 5638-1, General Code, were intended by the General Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the property of or belonging to such an institution. *It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation.* The Society for Savings is such an incorporated financial institution." (Emphasis supplied)

Appellant now seeks to invoke the jurisdiction of this Court contending that the decision below is in clear violation of precedents long established by this Court in that

it sanctions an assessment against capital invested in obligations of the United States.

2. The Decision of the Supreme Court of Ohio Holding That the Interest of the Owners of the Corporation in the Surplus, Reserves and Undivided Profits Was Subject to Taxation Is Not Contrary to any Precedents Established by This Court

Nothing would be gained by belaboring the clear and well reasoned opinion of Judge Taft which is summarized in the quotation set out above. It is submitted that it clearly demonstrates that the Supreme Court of Ohio sought to tax the ownership interests which individuals have in the surplus and reserves of the appellant bank. Appellant's apparently cannot bring themselves to this realization, and cite to this Court the familiar series of cases beginning with *Weston* v. *Charleston*, 2 Peters, 449, and including the *Bank Tax Cases*, 2 Wall., 200, *Farmer's Bank* v. *Minnesota*, 232 U. S., 516, and the recent case of *New Jersey Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S., 665. All of these cases stand for the proposition that the states cannot assess ad valorem taxes against obligations of the United States nor against capital which is invested in such obligations.

The Tax Commissioner has no quarrel with those cases. He does contend strongly, however, that they are not precedents which prevent the states from taxing the ownership interests which individuals have in corporations even though those corporations own government obligations. It has been settled since the case of *Van Allen* v. *Assessors*, 3 Wall., 573, that this ownership interest can be taxed when it is represented by a share of stock. It is submitted that the states also have the right to recognize and tax this ownership interest when it is in other forms—in this case an

interest in a mutual savings bank. The cases relied upon by the appellant do not deny such a right to the states.

3. The Appellant Cannot Invoke the Jurisdiction of This Court on the Ground that the Tax Is Improperly Assessed Against it, When it Has Never Attempted, by Appropriate Action Under the State Law, to Reimburse Itself for the Tax Paid

The Tax Commissioner realizes that it is one thing to recognize an ownership interest and to assess a tax against it, and quite another thing to insure that the tax is actually paid by the owner of the interest assessed. When the interest is owned by a shareholder in an ordinary corporation, the problem can be easily solved, and this Court has upheld various state statutes which have required payment by the corporation on account of its stockholders and allowed the corporation to reimburse itself for the tax so paid. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111.

But the appellant here says that the tax has in fact been borne by it, and that it has no right of reimbursement. Therefore, appellant says, the tax is simply an improper assessment against its capital.

It is submitted that this contention of the appellant leaps to its conclusion over several issues of state law which have never been raised, let alone decided against the appellant. It should first be pointed out that the taxes in question were voluntarily paid by appellant for the years 1947 to 1951 and that it now seeks a certificate of abatement on the ground that it never should have paid the tax. *Nowhere in the record does it appear that appellant has ever made*

any attempt to reimburse itself except from the State of Ohio.

Section 5673-2, General Code, in effect during all the times in question, provides as follows:

> "A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawal shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

It is true that this statute by its exact language does not confer the right of recoupment upon a mutual savings bank which has paid a tax upon the ownership interests of its depositors. But the Supreme Court of Ohio in clear and unequivocal language has held that those interests are subject to taxation. It does not require great imagination to conceive of that Court's also holding that under the tax laws as so construed a mutual savings bank properly could reimburse itself for the taxes paid by it on account of its depositors. This result might be reached by an interpretation of the statute set out above when read as part of the whole scheme of taxation; or it might be reached under some general principle of law. It seems reasonable to

suppose that the Supreme Court of Ohio would favor an interpretation of the law which would remove any constitutional doubts from its interpretation of the tax law, and which would favor recoupment.

But the appellant does not wish to avail itself of any such remedies. Instead it comes to this Court and asks it to provide an easy tax windfall on the assumption that the courts of Ohio would not allow appellant to reimburse itself from its depositors. It is submitted that this case is not properly presented to this Court until all of these questions of state law have been raised and settled in the state courts.

4. Even if This Case Were Properly Before This Court, the Supreme Court of Ohio, Was Correct in Holding That Because of the Identity Between Appellant and Its Depositors, Payment of the Tax by Appellant Was in Fact Payment by the Ownership Interests Assessed; and in Holding That Appellant Had Obtained Reimbursement from its Depositors.

Even if we assume that the appellant may raise for the first time a question of reimbursement which it has not raised below, the Supreme Court of Ohio correctly decided that point against the appellant.

Under Ohio law, the syllabus of a Supreme Court case is prepared by the Court and represents the law of the case (Section 2503.20, Revised Code). Paragraph 7 of the syllabus of the opinion in this case provides as follows:

> "7. Where all the ownership interests of the owners of a bank are vested in depositors of a single class, such bank may be required by statute to pay a property tax levied on such ownership interests if and when such bank has available for payment of interest to its depositors more than enough to pay the tax so levied."

Here the Ohio court interpreted the Ohio statute so as to require a mutual savings bank to pay the tax in question

only from funds which would otherwise be available for the payment of dividends to depositors. The Court then said that when this has been done, there has been reimbursement of the bank without further proceedings.

The Court based this latter conclusion on that part of its opinion which is set out at pages 136-140 of 161 Ohio State. There the Court discussed the law of mutual savings banks, and emphasized the complete identity of the bank and its depositors. Because of this complete identity—which goes so far as to make the depositors liable to assessment to make up any losses sustained by the enterprise—the Court said that money taken from the interest fund was in fact taken from the depositors in direct ratio to the amount of their deposits. It is submitted that this holding is sound, and disposes of appellant's contention that the tax in question is an assessment against the bank's capital as such.

In light of the above, it is submitted that appellants have failed to raise a debatable Constitutional question which is properly presented to this Court; that they have failed to exhaust remedies available to them under the state law; and that the appeal herein should be dismissed or the order of the Supreme Court of Ohio affirmed.

Respectfully submitted,

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